No. 89-7662

In The

Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF ON BEHALF OF RESPONDENT

MARY SUE TERRY
Attorney General of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

STEPHEN D. ROSENTHAL
Deputy Attorney General

JERRY P. SLONAKER
Senior Assistant Attorney General

*DONALD R. CURRY
Senior Assistant Attorney General

Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WHEN THE SUPREME COURT OF VIRGINIA EXPRESSLY GRANTED THE COMMONWEALTH'S MOTION TO DISMISS PETITIONER'S STATE HABEAS CORPUS APPEAL, AND THE MOTION WAS BASED *SOLELY* ON PETITIONER'S UNTIMELY NOTICE OF APPEAL, DOES *HARRIS V. REED*, 489 U.S. 255 (1989), PRESENT ANY OBSTACLE TO ENFORCEMENT OF THE PROCEDURAL DEFAULT DOCTRINE?

II. DOES THE "DELIBERATE BYPASS" TEST HAVE ANY APPLICATION IN THE CONTEXT OF A PROCEDURAL DEFAULT WHICH OCCURRED DURING A STATE *COLLATERAL* APPEAL?

III. CAN A PETITIONER SUCCESSFULLY ASSERT ATTORNEY ERROR AS "CAUSE" FOR A DEFAULT WHICH OCCURRED DURING STATE HABEAS CORPUS PROCEEDINGS WHERE HE HAD NO CONSTITUTIONAL RIGHT TO COUNSEL BUT WAS REPRESENTED BY THREE ATTORNEYS OF HIS OWN CHOOSING?

IV. DOES THE "NEW RULE" DOCTRINE PRECLUDE FEDERAL HABEAS RELIEF IN THIS CASE?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CITATIONS

TABLE OF CITATIONS – Continued

Page

TABLE OF CITATIONS – Continued

Page

TABLE OF CITATIONS – Continued

STATUTES AND RULES

TABLE OF CITATIONS – Continued

OTHER AUTHORITY

No. 89-7662

In The

Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF ON BEHALF OF RESPONDENT

STATEMENT OF THE CASE

On March 18, 1982, after a four-day trial, a jury in the Circuit Court of Buchanan County, Virginia, convicted the petitioner, Roger Keith Coleman, of the rape and capital murder of his sister-in-law, Wanda McCoy.[1] For the rape

[1] Coleman killed his victim by inflicting a "slash wound" to her throat which severed the right carotid artery, jugular vein, and larynx. There were two stab wounds to the victim's chest, one of which penetrated the heart and lung but was inflicted after the victim's death. The other penetrated the victim's liver and was inflicted after death or close to the time of death. Coleman has a blood type possessed by only ten

(Continued on following page)

conviction, the jury fixed Coleman's punishment at life imprisonment. The next day, after a separate hearing on the issue of punishment for the capital murder conviction, the jury fixed a sentence of death.[2] On April 23, 1982, the trial court imposed the death penalty in accordance with the jury's verdict. The capital murder conviction and death sentence were affirmed by the Supreme Court of Virginia on September 9, 1983. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983). This Court denied a petition for a writ of certiorari on March 19, 1984. *Coleman v. Virginia*, 465 U.S. 1109 (1984).

Represented by attorneys of his own choosing, Coleman then filed a petition for a writ of habeas corpus in Buchanan County Circuit Court on April 26, 1984. On November 12-13, 1985, an evidentiary hearing was conducted. In a letter opinion dated June 23, 1986, the circuit court rejected Coleman's claims (J.A. 3-15), and in an order signed on September 4, 1986, entered final judgment. (J.A. 16-19). Petitioner's counsel received a copy of the dismissal order no later than September 11, 1986. (See Cert.Ptn. No. 87-5448 at 4; copies lodged with this Court).

Coleman's three attorneys filed a notice of appeal in the circuit court on October 7, 1986. (J.A. 28-33). Then, on

---

(Continued from previous page)

percent of the population. Sperm found in the victim's vagina emanated from someone with the same blood type as Coleman's, two hairs found on the victim's pubic area matched Coleman's pubic hair, and blood matching the victim's type was found on Coleman's blue jeans. Coleman also admitted to a fellow jail inmate that he had raped the victim.

[2] Coleman had committed an attempted rape in 1977 and had been sentenced to three years in the penitentiary for that offense. In recommending the death sentence, the jury found that Coleman presented a future danger to society *and* that his offense was "outrageously or wantonly vile" in that it involved torture, depravity of mind, and aggravated battery to the victim. *See* Va. Code § 19.2-264.2.

October 25, 1986, they filed a motion requesting the circuit court to "correct" the date of final judgment from September 4, 1986 to September 9, 1986. In an order dated November 10, 1986, however, the circuit court denied the motion, stating that "final judgment in this case was entered on September 4, 1986 and . . . the records of this Court correctly reflect that fact at the present time." (J.A. 20).

On December 3, 1986, Coleman's attorneys filed a petition for appeal in the Virginia Supreme Court. On December 9, 1986, the Commonwealth filed a motion to dismiss Coleman's appeal based upon the fact that his notice of appeal had been untimely filed. (J.A. 22-24). By an order dated May 19, 1987, the Virginia Supreme Court expressly granted the motion and dismissed Coleman's petition for appeal. (J.A. 25-26). On June 2, 1987, Coleman filed a petition for rehearing which was denied on June 12, 1987. (J.A. 27).

Coleman filed a petition for a writ of certiorari in this Court on September 10, 1987. The petition was denied on October 19, 1987. *Coleman v. Bass*, 484 U.S. 918 (1987).

Coleman then filed his federal habeas corpus petition in the United States District Court for the Western District of Virginia on April 22, 1988. After extensive briefing, the district court heard oral argument on September 19, 1988. In a sixteen-page opinion dated December 6, 1988, Judge Glen M. Williams concluded that most of Coleman's claims were procedurally barred by his default during the state habeas appeal. (J.A. 36-39). Nevertheless, the district court also reviewed the merits of those claims, as well as the others which Coleman had raised in his petition, and concluded that Coleman was not entitled to federal habeas relief. (J.A. 39-52).

A unanimous panel of the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision on January 31, 1990. *Coleman v. Thompson*,

895 F.2d 139 (4th Cir. 1990). (J.A. 53-68). Unlike the district court, the Fourth Circuit relied primarily upon Coleman's procedural default during his state habeas appeal. (J.A. 55-64). The court, however, also reviewed the merits of petitioner's claims which challenged the constitutional adequacy of the penalty-stage instructions to the jury and found those claims lacking. (J.A. 64-68). Coleman's petition for a rehearing en banc was denied on February 27, 1990. (J.A. 69).

This Court granted certiorari on October 29, 1990. *See* 111 S.Ct. 340 (1990).

SUMMARY OF ARGUMENT

I

Harris v. Reed and its "plain statement" rule must be applied with a reasonable measure of common sense, and the Court of Appeals did so in this case. Nothing in *Harris* undermines the indisputable fact that Coleman's state habeas appeal was dismissed *solely* because he violated a mandatory and jurisdictional rule of Virginia appellate procedure.

When Coleman failed to file a notice of appeal within thirty days after entry of the judgment dismissing his state habeas petition, he thereby deprived the Supreme Court of Virginia of the jurisdiction to determine his constitutional claims. *See* Va.S.Ct. Rule 5:9(a). *Harris'* "plain statement" requirement, if applicable at all, was clearly satisfied: (1) there is no basis for concluding that the Virginia Supreme Court's dismissal of Coleman's habeas appeal was premised upon federal law; (2) the state court expressly granted the Commonwealth's motion to dismiss which was based *solely* on procedural grounds; and (3) Coleman has admitted repeatedly that the state appellate court refused to reach the merits of his federal claims because of his procedural default.

II

This Court need not decide whether the "deliberate bypass" test still applies in the factual situation presented in *Fay v. Noia*, 372 U.S. 391 (1963), because Coleman's default occurred during a civil collateral appeal – a fundamentally different situation than *Fay*, where the default occurred on direct appeal from a criminal conviction. This basic distinction most clearly manifests itself in the twin principles that state collateral proceedings are not constitutionally required and that, unlike a defendant on

direct appeal, a state habeas petitioner has no constitutional right to the effective assistance of counsel.

Nevertheless, the "cause and prejudice" standard established in *Wainwright v. Sykes*, 433 U.S. 72 (1977), should apply to all procedural defaults, regardless of the stage at which the default occurred or whether counsel's error resulted in a partial or total default. *Fay*'s inherently subjective and internal "deliberate bypass" test is woefully inadequate to safeguard the vital interests of finality and comity which are the foundation of *Sykes* and its progeny.

III

An alleged error by state habeas counsel can never constitute "cause" for a procedural default. Any other conclusion would be antithetical to the very principles that inform the "cause and prejudice" standard, and would release an endless stream of state and federal litigation challenging the "effectiveness" of previous habeas counsel's performance.

In the absence of a constitutional right to counsel and the corollary right to the effective assistance of counsel, "cause" must be both objectively verifiable and external to the petitioner. Thus, where a default results from state habeas counsel's late filing of a notice of appeal, "cause" cannot be established.

Coleman must bear the burden of the default caused by the team of lawyers he chose to represent him. If such a burden had fallen upon one who was "actually innocent," however, the "miscarriage of justice" safety valve would have been applicable and would have provided relief. But where, as here, there can be no substantial claim of "actual innocence," there is simply no constitutional justification for requiring the Commonwealth to assume responsibility for a default over which it had no control.

IV

The "new rule" doctrine greatly, and beneficially, simplifies federal habeas corpus proceedings by cutting through the complexities of issues such as procedural default, and by declaring federal habeas relief "off limits" if the petitioner is asking the federal court to apply or announce a "new rule." The focus of the "new rule" doctrine is exactly where it should be: on the reasonableness of a state court's rejection of federal claims at the time a petitioner's conviction became final.

Here, all of Coleman's federal claims were reasonably rejected by the state habeas judge, and the district court's concurrence in that conclusion amply demonstrates that none of Coleman's proposed "new rules" can be announced in this collateral proceeding. Thus, even if Coleman's procedural default were completely ignored, federal relief would remain unavailable to him.

ARGUMENT

I

THE "PLAIN STATEMENT" RULE IS EITHER INAPPLICABLE TO THIS CASE OR HAS BEEN FULLY SATISFIED.

In *Harris v. Reed*, 489 U.S. 255 (1989), this Court extended application of the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), from direct appeal cases to federal habeas corpus. *Harris*, 489 U.S. at 263. Coleman contends that the Virginia Supreme Court's order dismissing his state habeas appeal failed to satisfy the "plain statement" requirement, and he asserts that the state court might have denied his federal constitutional claims on the merits.[3] There are a number of compelling reasons, however, for rejecting this contention.

---

[3] In his petition for certiorari, Coleman argued that because "[n]othing in the order specified that the dismissal

(Continued on following page)

A

THE "PLAIN STATEMENT" RULE IS INAPPLICABLE WHERE, AS HERE, IT CANNOT FAIRLY BE SAID THAT THE STATE COURT RESTED ITS DECISION PRIMARILY ON FEDERAL LAW.

While it certainly is clear that in *Harris* this Court extended the applicability of *Long*'s "plain statement" rule to cases on habeas review, it is equally clear that the Court did not intend to change, or make more strict, the rule which the Court had articulated in *Long*. *See Harris*, 489 U.S. at 265 ("[W]e are not persuaded that we should depart from *Long* . . . simply because this is a habeas case."). It is, therefore, essential to focus upon exactly how this Court stated the rule in *Long* and how the *Harris* Court understood *Long*'s "plain statement" rule.

Justice O'Connor stated the *Long* rule for the Court in the following manner:

(Continued from previous page)

was granted on procedural default grounds" the motion to dismiss "might well have been granted because the [Virginia Supreme Court] found the petition to be without substantive merit." (See Cert. Ptn. at 22-23). Curiously, Coleman now argues that the state court's dismissal order allows only two possible interpretations, both of which conclude that the appeal was dismissed "as untimely." (Pet. Br. 9). And Coleman now expressly concedes that the dismissal was not "directly on the federal merits." (Pet. Br. 9 n.2). While the Commonwealth maintains that Coleman's appeal was dismissed *solely* on procedural grounds, if it is undisputed that the appeal was dismissed "as untimely," and if the Virginia Supreme Court reached the merits of Coleman's federal claims only as an alternative basis for its ruling, *Harris v. Reed* was clearly satisfied. *See* 489 U.S. at 264 n.10 ("state court need not fear reaching the merits of a federal claim in an *alternative* ruling") (emphasis in original).

> [W]hen, as in this case, a state court decision *fairly appears to rest primarily on federal law, or to be interwoven with the federal law,* and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Long, 463 U.S. at 1040-1041 (emphasis added). *See also id.* at 1044 ("[I]t fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law."); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) ("[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law. . . . ' ").

And, in *Harris*, this Court did not in any way depart from this articulation of the rule:

> Under *Long, if "it fairly appears that the state court rested its decision primarily on federal law,"* this Court may reach the federal question on review unless the state court's opinion contains a " 'plain statement that [its] decision rests upon adequate and independent state grounds.' "

Harris, 489 U.S. at 261, *quoting Long*, 463 U.S. at 1042 (emphasis added). It is readily apparent, therefore, that in *Long, Caldwell* and *Harris* this Court recognized that the condition precedent for requiring compliance with the "plain statement" rule is that it must "fairly appear that the state court rested its decision primarily on federal law." *See also Pennsylvania v. Finley*, 481 U.S. 551, 563 (1987) (Brennan, J., dissenting) ("There is no need for a plain statement indicating the independence of the state grounds since there was no federal law interwoven with this determination."). This understanding of the "plain statement" rule has continued even in the aftermath of *Harris*. *See Illinois v. Rodriguez*, 110 S.Ct. 2793, 2798 (1990);

Milkovich v. Lorain Journal Co., 110 S.Ct. 2695, 2701 n.1 (1990); *Quinn v. Millsap*, 109 S.Ct. 2324, 2328-2329, n.6 (1989).

In *Long*, *Caldwell*, *Harris* and *Rodriguez*, the state courts had expressly discussed and decided the merits of the prisoners' federal claims. *See Long*, 463 U.S. at 1043-1044; *Caldwell*, 472 U.S. at 328; *Harris*, 489 U.S. at 258; *Rodriguez*, 110 S.Ct. at 2798. Under such circumstances, application of the "plain statement" rule had some basis in logic. In Coleman's case, however, the Virginia Supreme Court unambiguously granted the Commonwealth's motion to dismiss, a motion based *solely* upon Coleman's failure to comply with Virginia's mandatory and jurisdictional requirement of a timely notice of appeal. (J.A. 22-24).

The state court's decision at issue here neither discussed nor purported to decide Coleman's federal claims, and there is no reasonable basis for a conclusion that the state court's ruling "rested . . . primarily on federal law."[4] Thus, the condition precedent required for invocation of the "plain statement" rule simply does not exist in this case.

---

[4] Coleman emphasizes the fact that the Virginia Supreme Court's dismissal order recited all the pleadings and briefs which the parties had filed before the court granted the Commonwealth's motion to dismiss. (J.A. 25). According to Coleman, the fact that the order stated, "Upon consideration whereof, the motion to dismiss is granted . . . " (J.A. 26), means that the Virginia Supreme Court "considered" the merits of his federal claims. (Pet. Br. 7, 18). This argument reduces the "plain statement" rule to an absurdity. The question is whether the Virginia Supreme Court *decided* the merits of Coleman's federal claims, *not* whether it merely read Coleman's merits brief or thought about the merits of his claims. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985) (state ground not "independent" where state court expressly rejected merits of federal claim and then applied default rule which was totally "depend[ent] on an antecedent ruling on federal law").

B

WHEN THE VIRGINIA SUPREME COURT GRANTED THE COMMONWEALTH'S MOTION TO DISMISS COLEMAN'S STATE HABEAS APPEAL, AND THE MOTION WAS BASED *SOLELY* UPON COLEMAN'S UNTIMELY NOTICE OF APPEAL, THE "PLAIN STATEMENT" RULE WAS FULLY SATISFIED.

Even if the "plain statement" rule were applicable here, Coleman's reliance on *Harris v. Reed* would still be misplaced. The problem that this Court faced in *Harris* – a state court order which both of the lower federal courts had found to be "ambiguous" on the issue of procedural default – simply is not present here.

As was the case in both *Long*, 463 U.S. at 1043-1044, and *Caldwell*, 472 U.S. at 328, the state court in *Harris* had expressly discussed and resolved the merits of the petitioner's federal constitutional claims. *See Harris*, 489 U.S. at 258. Thus, an issue arose in all three cases as to whether the state courts' brief references to an adequate and independent state ground for denying relief constituted a procedural bar to federal review.[5]

Both the district court and the court of appeals in *Harris* had found that the state court's reference to procedural default was ambiguous. This fact is essential to an understanding of this Court's decision in *Harris*.

Immediately after reciting the lower courts' findings, this Court framed the issue as "whether a state court's

---

[5] In *Long*, the reference was to the provisions of the Michigan Constitution. 463 U.S. at 1037 n.3. In *Caldwell*, there was a "cryptic" reference to a procedural bar concerning appellate issues not raised in an assignment of error. 472 U.S. at 327. And in *Harris*, the Illinois appellate court had "referred to the 'well settled' principle of Illinois law that 'those issues which could have been presented [on direct appeal], but were not, are considered waived.' " 489 U.S. at 258.

ambiguous invocation of a procedural default bars federal habeas review." *Harris*, 489 U.S. at 259-260 (footnote omitted). And, when later discussing the problem of "state court opinions that are unclear" on the issue of whether the state court has actually enforced a procedural default, the Court expressly stated that "[i]n this case for example, both the District Court and the Court of Appeals found the Illinois Appellate Court's opinion ambiguous on this point." 489 U.S. at 262, n.8. *See also id.* at 275 n.1 (Kennedy, J., dissenting) ("[t]he presence of an ambiguity on this point is a logical antecedent to the application of the Court's rule.").

Whether a state court which has expressly resolved the merits of a petitioner's federal claims has also rested its decision on procedural default grounds is clearly a question of historical fact. And, where both lower federal courts have resolved that issue, as in *Harris*, by determining that the state court had not clearly enforced a procedural bar, this Court understandably accepts those findings. *See generally Anderson v. Bessemer*, 470 U.S. 564, 573-576 (1985) (describing "clearly erroneous" standard). *See also Harris*, 489 U.S. at 275 n.1 (Kennedy, J., dissenting) ("reasonable reading of the majority's opinion" is that Court treated existence of ambiguity "as a question determined . . . below" which the Court was "not inclined to revisit"). Not surprisingly, then, this Court held in *Harris* that a state court opinion which is "ambiguous" on the issue of procedural default is insufficient to bar federal review. *Harris*, 489 U.S. at 266. Coleman's case, however, is nothing like *Harris*.

It is undisputed here that the Virginia Supreme Court expressly granted the Commonwealth's motion to dismiss (J.A. 26) and that the motion was based *solely* on the fact that Coleman's notice of appeal was untimely. (J.A. 22-24). And, unlike the situations in *Long*, *Caldwell* or *Harris*, the Virginia Supreme Court never discussed or decided the merits of Coleman's federal claims. *See*

Harris, 489 U.S. at 266 n.13 (pointing out that what made the state court's reference to procedural default "ambiguous" was the fact that the court "clearly went on to reject the federal claim on the merits"). Indeed, any conceivable doubt about the clarity of the Virginia Supreme Court's ruling evaporated when the court rejected Coleman's petition for rehearing, which was an unequivocal effort to convince the court to reconsider its default ruling and reach the merits of his claims. (See Argument IC, *infra*, at 18).

Neither the district court nor the Fourth Circuit found that the Virginia Supreme Court's actions were ambiguous. To the contrary, the Court of Appeals found that:

> The Supreme Court [of Virginia] complied with the "plain statement" rule that *Harris* made applicable to habeas corpus proceedings. *The Virginia Supreme Court's brief order shows precisely how the Court dealt with the petition for appeal.* The Court recites that it considered all of the papers filed by the parties. *The Court then granted the motion to dismiss, which was based on Coleman's failure to comply with Virginia Supreme Court Rule 5:9(a), and dismissed the appeal.*

(J.A. 57, emphasis added).

This case, therefore, is the exact opposite of the situation in *Harris*. Here, both of the lower federal courts found, *not* that the state court order was ambiguous, but that the state court had clearly dismissed Coleman's petition for appeal for reasons of procedural default. Under no stretch of the imagination can these findings be deemed "clearly erroneous."[6]

---

[6] Indeed, even if it were not self-evident that the granting of a motion to dismiss based solely on procedural default grounds was a clear invocation of a state's default rules, the lower courts' findings would be adequately supported by

(Continued on following page)

Coleman contends, in effect, that the Fourth Circuit erred in applying *Harris* because the face of the Virginia Supreme Court's order does not recite that the Commonwealth's motion to dismiss was based upon Coleman's untimely notice of appeal. (Pet. Br. 10-11). Surely there is nothing in *Harris* that requires federal courts to take such a myopic view.

Even if Coleman had been unwilling to admit the indisputable, a cursory review of the three-page motion to dismiss demonstrates that it was premised entirely upon petitioner's late notice of appeal. (J.A. 22-24). Thus, the sort of time-consuming examination of the state court record which the Court sought to avoid in *Harris* is simply not implicated here. *See Harris*, 489 U.S. at 264-265.

Nor is there any reason why either the district court or the Court of Appeals should have been required to ignore its intimate familiarity with elementary principles of Virginia law. In fact, this Court has often emphasized the importance of deference to a construction of state law concurred in by both lower federal courts. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

It is true, of course, that *Harris* sought to relieve federal courts from having "to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *See Harris*, 489 U.S. at 265. In Coleman's case, however, no "extensive" analysis of Virginia law is necessary.[7]

(Continued from previous page)

Coleman's numerous concessions that the state court had refused to reach the merits of his constitutional claims. (See Argument IC, *infra*, at 17-19).

[7] This case is a good example of why, despite *Harris*, federal habeas courts will be unable to avoid delving into the

(Continued on following page)

Moreover, the procedural bar in this case was not merely "potentially applicable;" it was mandatory and jurisdictional.

Virginia Supreme Court Rule 5:9(a) is unmistakably clear: "No appeal shall be allowed unless, within 30 days after entry of final judgment . . . , counsel for the appellant files with the clerk of the trial court a notice of appeal. . . . " This rule has long been held to be both

---

(Continued from previous page)

details of the states' various procedural default rules. Even if a state court satisfies the "plain statement" rule, federal petitioners will invariably assert, as Coleman does here (Pet.Br. 16 n.9), that the state ground is not "adequate." As Justice Kennedy pointed out in his *Harris* dissent, determining the "adequacy" of the state procedural bar already "requires [the Court] to conduct extensive reviews of questions of state procedural law. . . . " *See* 489 U.S. at 277 (Kennedy, J., dissenting). Likewise, as Justice O'Connor pointed out in her concurrence, despite *Harris*, federal courts must continue to review state procedural default rules in the context of defaulted claims that were never presented to the state courts. *See* 489 U.S. at 269-270 (O'Connor, J., concurring), *citing Teague v. Lane*, 489 U.S. 288, 298 (1989), and *Engle v. Isaac*, 456 U.S. 107, 125-126, n.28 (1982). The goal of avoiding extensive reviews of the details of state procedural law was understandable in *Long* because that case was a *direct* appeal where this Court was the first and only federal court to address such state law matters. *See Long*, 463 U.S. at 1039 ("[E]xamining state law is unsatisfactory because it requires us to interpret state laws *with which we are generally unfamiliar*") (emphasis added). But this same goal is both futile and unnecessary in the context of habeas corpus cases: futile because federal courts will ultimately be required to analyze state procedural rules anyway; and unnecessary because, unlike this Court, the lower federal courts are presumed "experts in matters of local law and procedure." *See Harris*, 489 U.S. at 283 (Kennedy, J., dissenting) (listing various contexts in which this Court has justifiably relied on lower federal courts' expertise in matters of state law).

mandatory and jurisdictional. *See Vaughn v. Vaughn*, 215 Va. 328, 329, 210 S.E.2d 140, 142 (1974); *Mears v. Mears*, 206 Va. 444, 445, 143 S.E.2d 889, 890 (1965). The 30-day time limit cannot be extended. *See* Va.S.Ct.R. 5:5(a).

The Commonwealth's motion to dismiss Coleman's state habeas appeal was clearly based upon these mandatory procedural rules. (J.A. 22-24). Both the district court and the Fourth Circuit correctly recognized that, when the Virginia Supreme Court expressly granted the motion to dismiss, it was doing precisely what it was *required* to do under Virginia law.[8] *See School Bd. of Lynchburg v. Caudill Rowlett Scott*, 237 Va. 550, 556, 379 S.E.2d 319, 323 (1989) ("This Court . . . lacks jurisdiction to entertain the appeal on its merits because no notice of appeal was filed . . . within 30 days . . . as required by Rule 5:9"). *See also Towler v. Commonwealth*, 216 Va. 533, 535, 221 S.E.2d 119, 121 (1976) ("dismissal will continue to be the price of failure to comply with mandatory rule provisions").

Certainly, if *Harris* had been decided at the time the state court acted on Coleman's petition, the court could have taken this Court's suggestion and included express language that relief was being "denied for reason of procedural default." *See Harris*, 489 U.S at 265 n.12. But *Harris* was still almost two years in the offing when the state court acted in this case. Under these circumstances,

[8] The courts below also were entitled to rely upon the elementary principle of Virginia law that when the Virginia Supreme Court affirms the decision of the trial court, it "refuses" the petition for appeal. *See Saunders v. Reynolds*, 214 Va. 697, 204 S.E.2d 421 (1974). *See also Smith v. Murray*, 477 U.S. 527, 532 (1986), *citing Smith v. Morris*, 221 Va. cxliii (noting disposition of state habeas appeal as "appeal refused"). Thus, the "dismissal" of Coleman's petition for appeal was a clear and unmistakable indication that the state court had enforced its default rule. *See Mears*, 206 Va. at 449, 143 S.E.2d at 892 (appeal "dismissed" for late notice of appeal).

reaching the merits of Coleman's federal claims because the state court failed to include "magic words" in its order would further none of the interests that *Harris* was intended to foster, but *would* do substantial harm to the interests of finality and comity that underlie the procedural default doctrine.[9] *Cf. Long*, 463 U.S. at 1044 n.10 (pertinent to inquire whether it is "unfair" to require a " 'plain statement' *in this case*") (emphasis added).

Nothing can be gained by the type of blind, mechanical application of *Harris* proposed by Coleman. As demonstrated below, everyone in this case, *including Coleman*, has known from the moment the Virginia Supreme Court dismissed his habeas appeal that the court did so for one reason and one reason only: his untimely notice of appeal.

C

COLEMAN'S NUMEROUS UNEQUIVOCAL CONCESSIONS THAT THE VIRGINIA SUPREME COURT NEVER REACHED THE MERITS OF HIS CLAIMS PRECLUDES HIM FROM ASSERTING THAT THE "PLAIN STATEMENT" RULE WAS NOT SATISFIED.

Throughout his federal habeas corpus proceedings, Coleman has taken the disingenuous position that the Supreme Court of Virginia might have rejected his claims on the merits when it dismissed his state habeas appeal. Before he embarked on federal habeas, however, Coleman took the opposite position both in the Virginia Supreme Court and in this Court: that the state court had denied

[9] Coleman's feigned solicitude for these interests (Pet. Br. 18-19) cannot mask the fact that the basic thrust of his argument is that this Court should assume that the Virginia Supreme Court ignored its own mandatory and jurisdictional rule. Reaching such an unsupported conclusion could only frustrate the interests of finality and comity.

him due process by dismissing his case on procedural grounds and by refusing to reach the merits of his claims.

Immediately after the Virginia Supreme Court dismissed his state habeas appeal, for example, Coleman filed a petition for rehearing wherein he repeatedly asked the court to reconsider its decision dismissing his appeal on procedural grounds and requested the court to decide his claims on the merits. (Va.S.Ct. Pet.Rhrg. at 1, 17, 20; copies lodged with this Court). Coleman then asked the Virginia Supreme Court to stay the execution of its judgment while he sought a writ of certiorari in this Court to review the *"dismissal of his habeas corpus appeal without consideration of the merits of that appeal,"* and he asserted that his state habeas appeal had been "recently dismissed . . . *without any consideration of the merits.*" (Va.S.Ct. pleading dated 7-6-87 at ¶¶1, 3 (emphasis added); copies lodged with this Court).

Coleman's forthrightness continued in the 1987 certiorari petition he filed in this Court. Indeed, the whole thrust of his petition was to persuade this Court that the Virginia Supreme Court had denied him due process by refusing to reach the merits of his federal claims.

For instance, Coleman contended that "[u]nder the Supreme Court of Virginia's novel interpretation, petitioner's notice of appeal was one day late [and that] *[o]n this basis alone*, the Court summarily dismissed Coleman's petition for appeal." (See Cert.Ptn. No. 87-5448 at 3; emphasis added). He then asserted that the Virginia Supreme Court had "deprived [him] of his due process right to have that Court fairly decide the merits of his petition for appeal" and that his case presented this Court with an "important opportunity" to decide whether a state court may "refuse to consider federal constitutional claims." (*Id.* at 7). He assured this Court that his petition presented "substantial federal constitutional claims . . . that the Virginia [Supreme Court] . . . declined to review because of a novel retroactive

interpretation of Rule 5:9" and that the state court had "dismissed [his] petition for appeal as untimely." (*Id.* at 9, 14). And then, finally and most tellingly, Coleman asked this Court to "remand [his case] to the Supreme Court of Virginia, directing that court to consider [his] petition for appeal *on the merits.*" (*Id.* at 18, emphasis added).

When a petitioner has repeatedly stated on the record, both in this Court and elsewhere, that the state court never reached the merits of his claims because it dismissed his appeal for reasons of procedural default, it would be ironic indeed for this Court to hold that the federal courts may reach the merits of those same claims because the "plain statement" rule was not satisfied. If the procedural default basis of the Virginia Supreme Court's ruling was clear enough to Coleman that he could premise a certiorari petition upon that court's refusal to decide the merits of his federal claims, then it surely was "plain" enough to satisfy any reasonable demands of the "plain statement" rule.

II

THE "CAUSE AND PREJUDICE" STANDARD, RATHER THAN THE "DELIBERATE BYPASS" TEST, GOVERNS COLEMAN'S DEFAULT DURING HIS STATE HABEAS CORPUS APPEAL.

A

THE "DELIBERATE BYPASS" TEST MUST BE STRICTLY CONFINED TO THE FACTS OF *FAY V. NOIA*.

This Court held in *Murray v. Carrier*, 477 U.S. 478 (1986), that the "cause and prejudice" standard applies fully to the procedural default of a particular claim on direct appeal. The Court, however, expressly reserved the issue "as to whether counsel's decision not to take an appeal at all might require treatment" under the "deliberate bypass" test set forth in *Fay v. Noia*, 372 U.S. 391

(1963). *See Carrier*, 477 U.S. at 492. Coleman contends that his case now requires the Court to decide that issue. This contention, however, ignores the basic distinction between a direct appeal, which was the context of *Fay v. Noia*, and a state collateral appeal, which is the context of the default at issue here.

When the Court reserved the "deliberate bypass" issue in *Carrier*, it expressly referred to the same issue which had been previously reserved in *Wainwright v. Sykes*, 433 U.S. 72 (1977). *See Carrier*, 477 U.S. at 492. That issue was whether "the *Fay* rule" continued to apply "to the facts there confronting the Court." *Sykes*, 433 U.S. at 88 n.12. Thus, when *Carrier* and *Sykes* are read in conjunction, it is clear that if *Fay*'s "deliberate bypass" test has *any* remaining vitality it must be strictly confined to the facts of that case.

As Justice Harlan said in his lengthy dissent in *Fay*, that case "is one of the most disquieting that the Court has rendered. . . . " 372 U.S. at 448 (Harlan, J., dissenting). Justice Harlan's grave concerns about "a decision which finds virtually no support in more than a century of this Court's experience," *id.* at 463, eventually prevailed when *Sykes* and *Carrier* all but eliminated the "deliberate bypass" test. *See Sykes*, 433 U.S. at 87-91; *Carrier*, 477 U.S. at 485-492. While *Fay* may certainly deserve a final burial, no such service need be conducted here because, unlike *Fay*, Coleman's case does not involve a default on direct appeal.

The defendant in *Fay* "had allowed the time for a *direct* appeal to lapse without seeking review by a state appellate court." 372 U.S. at 394 (emphasis added). The *Fay* majority was willing to recognize only "a limited discretion" in the federal habeas courts to deny relief because of a procedural default in state court. 372 U.S. at 438. Such circumstances were limited to those "that can fairly be described as the deliberate by-passing of state procedures," 372 U.S. at 439, and in the majority's view,

"Noia's reason for not appealing [did not] support an inference of deliberate by-passing of the state court system."[10] *Id.*

In formulating the "deliberate bypass" test, the *Fay* majority expressly relied upon "[t]he classic definition of waiver" articulated in *Johnson v. Zerbst*, 304 U.S. 458 (1938). *See Fay*, 372 U.S. at 439. That waiver standard, however, which requires "an intentional relinquishment or abandonment of a known right or privilege," clearly applies only to the waiver of "fundamental constitutional rights." *Johnson*, 304 U.S. at 464. Moreover, *Johnson* dealt with an accused's waiver of his personal constitutional right to be represented by counsel at trial. Neither *Johnson* nor *Fay* dealt with a petitioner's forfeiture of a non-constitutional "right" to litigate a collateral appeal. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments*, 38 U.Chi.L.Rev. 142, 160 (1970) ("Friendly") ("waiver" analysis inappropriate where state did not deprive one of something "to which he is constitutionally entitled").

While the decision whether to file the initial *direct* appeal as of right is so "fundamental" that a defendant cannot be bound by his attorney's decision not to appeal, *see Jones v. Barnes*, 463 U.S. 745, 751 (1983), and the first appeal as of right is so "fundamental" that a defendant has a right to the effective assistance of counsel at that stage, *see Evitts v. Lucey*, 469 U.S. 387, 396 (1985), this Court has clearly held that state *collateral* proceedings are

---

[10] As Justice Harlan observed in his dissent, after creating the "deliberate bypass" test, the *Fay* majority proceeded to ignore it. *See* 372 U.S. at 471 (Harlan, J., dissenting). Even though Noia had personally elected, after consultation with counsel, not to pursue his direct appeal, his default was excused merely because his choice was influenced by the fact that, if he prevailed on appeal, he might face the death penalty upon retrial. 372 U.S. at 439-440.

not "fundamental" in any constitutional sense. *See Pennsylvania v. Finley*, 481 U.S. at 557 ("States have no obligation to provide this avenue of relief, . . . and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well."). *See also id.* at 559 (petitioners on state habeas "are in a fundamentally different position [from defendants who are] at trial and on the first appeal as of right").

If a state is not constitutionally required to provide such proceedings, and if the Constitution does not require the right to counsel at such proceedings, then it hardly can be said that Coleman's right to petition the Virginia Supreme Court for an appeal from a *civil* habeas corpus judgment was a "fundamental" right that could not be defaulted in the absence of a deliberate personal decision not to appeal. *See Finley*, 481 U.S. at 556-557 ("Post conviction relief is even further removed from the criminal trial. . . . It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). *Fay*'s "deliberate bypass" test is thus, by definition, inapplicable to Coleman's default that occurred on state collateral appeal.

B

THE "CAUSE AND PREJUDICE" STANDARD APPLIES REGARDLESS OF THE STAGE AT WHICH THE DEFAULT OCCURRED OR THE TYPE OF ATTORNEY ERROR WHICH RESULTED IN THE DEFAULT.

Even at its inception, *Fay*'s "deliberate bypass" test was correctly recognized to be "wholly unsatisfactory" because "it amounts to no limitation at all." 372 U.S. at 470 (Harlan, J., dissenting). *See also* Friendly, *supra*, at 158 ("It is . . . difficult to imagine how the state could ever" meet such a standard). Indeed, Coleman asserts that he satisfied the "standard" merely because he had a "desire

to appeal." (Pet. Br. 8). Thus, even if it were assumed that the Commonwealth could not prevail unless *Fay* were laid to rest, this Court should reject the "deliberate bypass" test without hesitation.

Carrier established beyond question that the *Sykes* "cause and prejudice" standard applies to an *appellate* default even if the default resulted from counsel's ignorance, inadvertence or mistake. 477 U.S. at 489-492. This conclusion was dictated by the Court's recognition that federal review of defaulted claims exacts "considerable costs" to the interests of finality and comity and that those costs "do not disappear when the default stems from counsel's ignorance or inadvertence rather than from a deliberate decision. . . . " *Carrier*, 477 U.S. at 487. *See also id.* at 491 ("[T]hese costs are imposed on the state regardless of the kind of attorney error that led to the procedural default").

Just as importantly, *Carrier* also recognized that "[a] State's procedural rules serve vital purposes at trial, on appeal, *and on state collateral attack*." 477 U.S. at 490 (emphasis added). Indeed, " '[e]ach State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.' " *Carrier*, 477 U.S. at 491, *quoting Reed v. Ross*, 468 U.S. 1, 10 (1984). Thus, the Court rightly concluded in *Carrier* that "the standard for cause should not vary depending on the timing of a procedural default. . . . " 477 U.S. at 491. *See also Smith v. Murray*, 477 U.S. 527, 533 (1986) ("concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure"). Because the "cause and prejudice" standard applies to defaults occurring on *direct* appeal, logic dictates that a more lenient standard should not be applied

to defaults occurring during a civil *collateral* appeal, which is even more attenuated from the criminal trial.[11]

Coleman's procedural default may have stemmed from counsel's ignorance, inadvertence or mistake, but his failure to file a timely notice of appeal no less deprived the Virginia Supreme Court of the jurisdiction to hear and determine his constitutional claims. Federal review of the merits of Coleman's defaulted claims under these circumstances would thus do at least as much injury to the interests of finality and comity as would have occurred if he had only defaulted a particular claim or claims. After all, an appeal is merely the sum total of the particular claims that an appellant chooses to raise. The fact that a default results in all of a litigant's claims being dismissed, rather than some or most of his claims, is of no import in deciding the proper standard to govern the default.

The "deliberate bypass" test, by requiring the government to show a knowing and intentional personal waiver, which even then can be ignored as it was in *Fay*, is manifestly incapable of protecting the legitimate state interests at stake when a petitioner defaults his claims during a state collateral appeal. That "standard" provides

---

[11] Coleman does not dispute that the "cause and prejudice" standard generally applies to procedural defaults during state collateral proceedings. (Pet.Br. 29-30). Indeed, the courts of appeals that have considered the issue are unanimous in that conclusion. *See Arce v. Smith*, 889 F.2d 1271, 1272-1274 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2185 (1990); *Whitley v. Bair*, 802 F.2d 1487, 1500 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); *Ewing v. McMackin*, 799 F.2d 1143, 1150-1151 (6th Cir. 1986); *Morrison v. Duckworth*, 898 F.2d 1298, 1300 (7th Cir. 1990); *Simmons v. Lockhart*, 915 F.2d 372, 376 (8th Cir. 1990); *Anselmo v. Sumner*, 882 F.2d 431, 433 (9th Cir. 1989); *Pierre v. Shulsen*, 802 F.2d 1282, 1283 (10th Cir. 1986); *Harmon v. Barton*, 894 F.2d 1268, 1274 (11th Cir. 1990).

no protection at all and could never be satisfied where the default stems from the late filing of a notice of appeal.

Indeed, recognition of the inherent fallacy of such a "standard" would surely encourage over-zealous habeas corpus counsel to deliberately fail to file timely notices of appeal, with full confidence that their illusory "default" would deprive the state habeas appellate courts of the opportunity to review their clients' claims, but without risking forfeiture of federal review. And, even where there is no such "sandbagging," the practical consequences of an inadvertent default are precisely the same – piecemeal review and the prospect of a retrial delayed to a much later date. These concerns are the very ones that informed this Court's decision in *Carrier*, and they require that the "cause and prejudice" standard, and that standard alone, govern Coleman's default.[12]

---

[12] This conclusion is entirely consistent with the Court's decision in *Evitts*. There, the Court held that a state cannot deprive a criminal defendant of his initial direct appeal as of right merely because his attorney failed to perfect the appeal under the requirements of state law. 469 U.S. at 400. But that result had nothing to do with *Fay*, and indeed, *Fay* is not even mentioned in *Evitts*. Instead, the result in *Evitts* was dictated by the Court's conclusion that, because a defendant has a right to counsel during his first appeal as of right, he also has the right to *effective* counsel. 469 U.S. at 396. *Evitts*, therefore, fits neatly within the "cause and prejudice" standard. Under *Carrier*, ineffective counsel is "cause," 477 U.S. at 488, and therefore the prisoner in *Evitts* clearly satisfied that standard. But as *Evitts* itself recognizes, the right to effective counsel is totally dependent upon a constitutional right to counsel. 469 U.S. at 496 n.7. Thus, there is certainly nothing in *Evitts* which would require that the "deliberate bypass" standard be applied to a default that occurred during state collateral proceedings where there is no right to counsel, and consequently, no right to the effective assistance of counsel.

III

AN ERROR BY COUNSEL DURING STATE COLLATERAL PROCEEDINGS CANNOT CONSTITUTE THE "CAUSE" NECESSARY TO EXCUSE A PROCEDURAL DEFAULT.

A

WHERE, AS HERE, A PETITIONER CANNOT ESTABLISH "CAUSE" FOR HIS DEFAULT, THE "MISCARRIAGE OF JUSTICE" EXCEPTION PROVIDES ADEQUATE PROTECTION.

As a backdrop to the "cause" issue, it is important to remember that, in all but the most extraordinary of cases, prisoners who are true "victims of a fundamental miscarriage of justice" will be able to establish "cause." *Carrier*, 477 U.S. at 495-496 (citations omitted). A petitioner's inability to establish "cause" is thus a very strong indicator that he has not suffered a "miscarriage of justice."

Nevertheless, the Court has held that in that "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for [a] procedural default." *Carrier*, 477 U.S. at 496. The exception "is a kind of 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." *Harris*, 489 U.S. at 271 (O'Connor, J., concurring).

Thus, a conclusion that "cause" for a default cannot be established by pointing to an alleged error by state habeas counsel would not mean that a state prisoner would have no protection against a fundamentally unjust conviction. No matter how badly such a prisoner, or his counsel, abused state procedural rules, he would remain free to bring his claims to federal court and to obtain federal relief if he can make a showing of actual innocence.

In an effort to make such a showing, Coleman has asserted only that he "has maintained his innocence from the outset." (See Cert. Reply Br. at 15 n.10). He also reminds the Court of his "steadfast insistence on his innocence." (Pet.Br. 3). But these bare assertions fall far short of the mark.

Even if his default during his state habeas appeal were overlooked, and the Court were to ignore his other defaults at trial and on appeal (J.A. 18-19, 41, 46, 49, 51, 64), the opinions of the state habeas judge and the district court judge demonstrate that all of Coleman's federal claims, including all of his ineffective counsel claims, are meritless.[13] (J.A. 3-15, 18-19, 39-52). His claims pertaining to the constitutionality of the penalty-stage jury instructions were also rejected on the merits by the Fourth Circuit. (J.A. 64-68). These facts demonstrate that Coleman cannot show the "actual prejudice" required under the "cause and prejudice" standard. *See Sykes*, 433 U.S. at 84, 90-91.

The Fourth Circuit, moreover, correctly concluded that the evidence presented at trial clearly identified Coleman as the person who had raped and killed his victim, and that the "miscarriage of justice" exception therefore was inapplicable. (J.A. 61-62). Under these circumstances, Coleman has received all of the protection to which he is constitutionally entitled, and there is no reasonable

---

[13] In addition to rejecting Coleman's ineffective counsel claims (J.A. 42-45), the district court also rejected his claim concerning an allegedly biased juror. As the district court correctly concluded, the state habeas judge conducted a hearing on this claim and resolved the credibility issue in favor of the Commonwealth. (J.A. 39-41). The district court also rejected the merits of Coleman's allegations that the prosecution withheld exculpatory evidence. (J.A. 47-48).

probability that a constitutional violation has resulted in the conviction or sentencing to death of an innocent man.[14]

B

THIS COURT'S PRIOR DECISIONS COMPEL THE CONCLUSION THAT A DEFECTIVE PERFORMANCE BY HABEAS COUNSEL IS NOT "CAUSE."

1. There is no constitutional right to counsel during state habeas corpus proceedings.

A convicted indigent defendant has a constitutional right to counsel on his first appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963). This Court, however, has consistently held that such a right extends no further than the initial direct appeal.

More than fifteen years ago, the Court held that there is no constitutional right to counsel for a prisoner pursuing a discretionary appeal in state court or a writ of certiorari in this Court. *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). These twin conclusions were based upon the Court's recognition of the significant difference between an accused who "needs an attorney . . . as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence" and a convicted defendant who merely wants to file a discretionary appeal and use an attorney "as a sword to upset

---

[14] This conclusion is corroborated by sophisticated genetic testing recently conducted *by Coleman's own retained expert*. Upon Coleman's insistence that such testing was necessary to prove his alleged innocence, the state trial court ordered the Virginia State Police to submit the vaginal specimens from the victim to Coleman's scientific expert in California for "PCR-DNA" analysis. Coleman's expert reported his findings in writing and concluded that the "primary sperm donor" had the same genotype as Coleman's, which occurs in only 2% of the population. (Copies lodged with this Court).

the prior determination of guilt." *Ross*, 417 U.S. at 610-611. Since *Ross*, there has been an unbroken line of cases limiting the constitutional right to counsel to the first appeal as of right.

In *Wainwright v. Torna*, 455 U.S. 586 (1982), for example, this Court expressly reaffirmed *Ross* and held that a Florida prisoner, whose petition for a writ of certiorari had been dismissed by the Florida Supreme Court because "the application was not filed timely," "had no constitutional right to counsel" at that discretionary stage of the state's appellate proceedings. 455 U.S. at 586-587.

In 1985, while reaffirming *Douglas* and holding that the constitutional right to counsel during the first appeal as of right included the right to effective counsel, *Evitts*, 469 U.S. at 396, the Court once again expressly noted that the considerations underlying a discretionary appeal are different. 469 U.S. at 396 n.7, *citing Ross* and *Torna*.

In 1987, the Court was confronted directly with the issue of whether there is a constitutional right to counsel during state collateral proceedings. After reviewing the reasons why it had always held that there is no constitutional right to counsel for a discretionary appeal, the Court concluded that "[t]hese considerations apply with even more force to post-conviction review" because:

> States have no obligation to provide this avenue of relief, . . . and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

Finley, 481 U.S. at 556-557 (citation omitted).

Then, just two terms ago, the Court expressly reaffirmed *Finley* and held that no different rule should apply with respect to the right to counsel during state habeas corpus proceedings in capital cases:

> We think that . . . the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases. State collateral

> proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.

Murray v. Giarratano, 109 S.Ct. 2765, 2770-2771 (1989) (footnote omitted); *see also Smith v. Murray*, 477 U.S. at 538 ("cause and prejudice" standard equally applicable in capital cases).

There is, therefore, no room for argument that the constitutional right to counsel extends beyond the initial direct appeal.[15] Coleman simply had no constitutional right to counsel during his habeas appeal to the Virginia Supreme Court.

2. The right to effective assistance of counsel is totally dependent upon the existence of a constitutional right to counsel.

While not taking issue with the substantive holdings of *Finley* and *Giarratano*, Coleman nevertheless contends that his state habeas counsel's performance was "ineffective" and that the "ineffective assistance" rendered by his attorneys should constitute "cause" for his procedural

---

[15] Indeed, petitioner has expressly disavowed any intention of challenging *Finley* and *Giarratano*'s conclusion that there is "no constitutional right to post-conviction counsel." (Pet. Br. 23; see also Pet. Br. 34: "Petitioner does not seek to reargue *Giarratano*.").

default. (Pet.Br. 22-24, 34-35). This Court's prior decisions, however, establish beyond question that a constitutional right to counsel is an indispensable condition precedent to a finding of "ineffective assistance."

In *Torna*, for example, this Court held that "[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application [for a writ of certiorari] timely." 455 U.S. at 587-588 (footnote omitted). And, in *Evitts*, the Court cited *Torna* with approval and stated expressly, "Of course, the right to effective assistance of counsel is dependent on the right to counsel itself." 469 U.S. at 369 n.7.

More recently, in *Finley*, this Court rejected a state prisoner's argument that her counsel's performance during state collateral proceedings was "ineffective" and therefore had violated her right under *Evitts* to the effective assistance of counsel:

> We think that *Evitts* provides respondent no comfort. . . . [T]he substantive holding of *Evitts* – that the State may not cut off a right to appeal because of a lawyer's ineffectiveness – depends on a *constitutional right to appointed counsel that does not exist in state habeas proceedings.*

Finley, 481 U.S. at 558 (emphasis added).

A fortiori, because Coleman did not have a right to counsel during his state habeas appeal, he had no right to effective assistance from the attorneys he chose to represent him.

3. In the absence of a constitutional right to counsel and a violation of the right to effective assistance, the petitioner bears the risk of attorney error.

The only way for Coleman to prevail, then, is for this Court to hold for the first time that an error by habeas counsel, which under no circumstances could constitute a

violation of a constitutional right to counsel, can nevertheless constitute "cause" for a procedural default. There are a number of compelling reasons for this Court *not* to effect such an extraordinary change in the law.

In *Carrier*, the issue was whether a criminal defendant or the state should bear the risk of inadvertent attorney error resulting in a procedural default during direct appeal. The Court resolved that issue by concluding:

> [T]he question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not *constitutionally* ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.

477 U.S. at 488 (emphasis added).

The essence of the Court's ruling in *Carrier* is that a habeas petitioner can establish "cause" for a procedural default by pointing to a defective performance by counsel if, and only if, counsel was *constitutionally* ineffective. For while "[i]neffective assistance of counsel . . . is cause for a procedural default," 477 U.S. at 488, "[a]ttorney error short of ineffective assistance of counsel does not constitute cause . . . even when [the] default occurs on appeal rather than at trial." *Id.* at 492.

There can be no doubt, then, that the state cannot be forced to bear the risk of attorney error where the default occurred at proceedings at which the petitioner did not have a constitutional right to counsel or a constitutional right to the effective assistance of counsel. Contrary to Coleman's assertion that "[t]he existence of a constitutional right to counsel is irrelevant" to the existence of "cause" (Pet. Br. 23), this Court made clear in *Carrier* that where "the procedural default is the result of ineffective

assistance of counsel, [it is] the Sixth Amendment itself [that] requires the responsibility for the default [to] be imputed to the State. . . . " 477 U.S. at 488. *See also Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). Consequently, where there is no constitutional basis for imputing such responsibility to the state, the risk of attorney error must be borne by the petitioner.[16] *See Prihoda v. McCaughtry*, 910 F.2d 1379, 1386 (7th Cir. 1990) (Easterbrook, J.) ("[I]neffective assistance supplies 'cause' only when the Constitution requires the state to assure adequate legal assistance."). *Cf. Finley*, 481 U.S. at 556 ("it is the source of [the] right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question").

That conclusion is particularly appropriate in this case because Coleman cannot successfully assert even the vaguest notion of a "due process" violation as a basis for a finding of "cause." Not only did he have no constitutional right to counsel at the time of his procedural default, but the error was committed by attorneys of Coleman's own choosing; these were not attorneys who

---

[16] It is true that in *Carrier* this Court cited "the right to the effective assistance of counsel" as "an additional safeguard against miscarriages of justice." *See* 477 U.S. at 496. But the Court did so only after stating its confidence that true "victims of a fundamental miscarriage of justice" will be able to establish "cause" and that those few who cannot will be able to obtain appropriate relief if they make a showing of actual innocence. *Id.* at 495-496. There is nothing in *Carrier*, however, that would support a conclusion that a petitioner can establish "cause" based upon an allegation of ineffective assistance where no right to effective assistance exists. *Cf. Pulley v. Harris*, 465 U.S. 37, 50 (1984), *explaining Zant v. Stephens*, 462 U.S. 862 (1983) (In *Zant*, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required").

in any sense were foisted upon Coleman by the Commonwealth, but were the same attorneys whom Coleman himself had chosen to institute his state habeas corpus proceedings.

In *Wainwright v. Torna*, the default occurred because the petitioner's retained counsel failed to perfect a timely discretionary appeal. 455 U.S. at 587. After rejecting Torna's claim that he had been denied the effective assistance of counsel, the Court also held:

> Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation – even if implicating a due process interest – *was caused by his counsel, and not by the State.* Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not timely filed did not deprive respondent of due process of law.

Id. at 588 n.4 (emphasis added). *See also Thomas v. Arn*, 474 U.S. 140, 155 (1985) (no due process violation where federal habeas appeal waived by counsel's failure to file objections to magistrate's report).

Torna, then, clearly demonstrates that, while the Court is generally unwilling to draw a distinction between the actions of appointed and retained counsel, *see, e.g., Evitts*, 469 U.S. at 395-396, such a distinction *is* relevant where there is no constitutional right to counsel at all – appointed or retained. Indeed, *Evitts* itself recognized that "[t]he constitutional mandate [guaranteeing the effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law." 469 U.S. at 396. The default in *Evitts* occurred on direct appeal where the defendant had a constitutional right to effective assistance, and the fact that the error had been committed by a retained attorney was thus constitutionally irrelevant.

In state habeas proceedings, however, a petitioner has no constitutional right to counsel. The state, moreover, is not attempting to obtain a criminal conviction, but is merely endeavoring to defend a presumptively valid state court judgment against a petitioner's collateral attack. Thus, in Coleman's case, where the error was committed by counsel of his own choosing at a proceeding where there was no constitutional right to counsel, there can be no plausible basis for a finding of the "state action" necessary to sustain a due process claim. Consequently, there likewise can be no plausible basis for a finding of "cause" or for imputing responsibility for Coleman's default to the Commonwealth.

4. An error by habeas corpus counsel is not an "external factor" which prevented or impeded Coleman from complying with Virginia's procedural rules.

Where counsel's performance does not violate a constitutionally mandated right to effective assistance, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show some *objective factor external to the defense* impeded counsel's efforts to comply with the State's procedural rule." *Carrier*, 477 U.S. at 488 (emphasis added). Coleman must thus show that an "external factor" somehow impeded his attorneys' efforts to file a timely notice of appeal in compliance with Virginia Supreme Court Rule 5:9.

In this context, Coleman has pursued two lines of attack. The first – that the procedural bar at issue is not an"adequate" state ground (Pet. Br. 16 n.9) – would, if successful, render a showing of "cause" unnecessary. His second argument, raised for the first time in this Court, is that by generally restricting the litigation of ineffective counsel claims to collateral proceedings where a petitioner has no constitutional right to counsel, Virginia somehow has erected an external impediment to his

assertion of those claims.[17] (Pet. Br. 37-39). Neither argument can withstand scrutiny.

a. Failure to file a timely notice of appeal is clearly an "adequate" state ground.

The "adequacy" of Virginia's mandatory rule concerning the timely filing of a notice of appeal cannot be seriously questioned. In fact, although the "adequacy" issue was raised and decided in the court below (J.A. 58-59), Coleman's petition for certiorari took no issue with the adequacy of the state procedural bar. The issue therefore cannot be resurrected now. *See Buchanan v. Kentucky*, 483 U.S. 402, 404 n.1 (1987) (Court refused to reach questions "not included as questions in the petition for certiorari"); Rule 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.").

Like the federal courts generally, and this Court in particular, the Virginia Supreme Court has a strong legitimate interest in defining its appellate jurisdiction with temporal certainty. Indeed, "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944).

---

[17] The fact that ineffective counsel claims generally cannot be raised until collateral proceedings was never asserted in the Fourth Circuit as a basis for a finding of "cause." (See Pet. CA4 Br. at 25-28; CA4 Reply Br. at 5-6). In the court below, Coleman's assertion of "cause" was based primarily on the alleged right to counsel which this Court has since rejected in *Murray v. Giarratano*. Petitioner should not be permitted to rely on a "cause" theory never presented to the Fourth Circuit. *See Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987).

With respect to federal civil cases, both in the context of appeals and petitions for certiorari, this Court strictly enforces a mandatory and jurisdictional time limit. *See, e.g., Gabriel v. United States*, 429 U.S. 877 (1976) (untimely notice of appeal); *Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1974) (untimely petition). *See generally* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, §§ 6.1(d) and 7.2(d) at 306, 403 (6th ed. 1986). In fact, Rule 13.3 of this Court expressly directs that "[t]he Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time." The Virginia Supreme Court, like this Court, has a substantial interest in enforcing procedural bars such as the one at issue here.

Nor is there any merit to Coleman's contention that the bar was unfairly enforced under the facts of his case. There is nothing unfair about enforcing a filing deadline even when the filing is just one day late. *See Monger v. Florida*, 405 U.S. 958 (1972) (state court default premised on one-day-late notice of appeal is "adequate" to bar federal relief). *See also Torna*, 455 U.S. at 588 n.4 (state court dismissal of discretionary appeal because notice one day late did not deny due process); *Deal*, 402 U.S. at 962-964 (certiorari denied where petition filed one day late only because courier "lost all the papers").

In Coleman's case, the state habeas judge signed the dismissal order on September 4, 1986. (J.A. 19-20). Coleman, however, had known for more than two months since receiving the judge's June 23, 1986, opinion letter that the petition was going to be dismissed. (J.A. 3). Coleman's attorneys actually received the court's dismissal order no later than September 11, 1986. (See Cert.Ptn. No. 87-5448 at 4). Nevertheless, the notice of appeal was not filed until October 7, 1986, thirty-three days after judgment had been entered and at least

twenty-six days after receipt of the dismissal order.[18] (J.A. 33).

As the Fourth Circuit noted (J.A. 59), it has long been the law in Virginia that a judgment is "entered" when the order is signed by the trial judge. *See Peyton v. Ellyson*, 207 Va. 423, 430-431, 150 S.E.2d 104, 110 (1966) (habeas judgment entered when judge "signed the order"); *McDowell v. Dye*, 193 Va. 390, 394, 69 S.E.2d 459, 462-463 (1952) (judgment entered not when pronounced but on date order signed by judge). It has never been the law in Virginia that a judgment is not "entered" until it is physically recorded in the court's order book. *See Daley v. Commonwealth*, 132 Va. 621, 622-623, 111 S.E. 111 (1922) (time to file bill of exceptions in criminal case not extended by fact that order not recorded in order book until after judgment was entered).

Virginia strictly and consistently enforces its default rules.[19] *See, e.g., Whitley v. Bair*, 802 F.2d 1487, 1500 (4th

---

[18] Coleman erroneously asserts that his notice of appeal would have been timely if he had sent it to the court by registered or certified mail. (Pet. Br. 4, 16 n.9). The so-called "mailbox" rule embodied in Virginia Supreme Court Rule 5:5(b) applies only to documents "required to be filed with the clerk of *this* Court," meaning the clerk of the Supreme Court of Virginia. The notice of appeal which Coleman failed to file in a timely manner is a document filed "with the clerk of the trial court," *not* the clerk of the Virginia Supreme Court. Va.S.Ct. Rule 5:9(a). There is no "mailbox rule" with respect to such documents and they must be actually received by the clerk of the trial court before the filing deadline passes. *See Mears*, 206 Va. at 445-446, 143 S.E.2d at 890.

[19] Coleman's argument to the contrary is so weak that he cannot, and does not, cite even a single case where the Virginia Supreme Court has excused an untimely notice of appeal. Indeed, the cases he *does* cite, *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970), and *O'Brien v. Mobil Oil*, 207 Va. 707, 152

(Continued on following page)

Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); *Conquest v. Mitchell*, 618 F.2d 1053, 1056 (4th Cir. 1980). This Court has also noted this fact. *See Smith*, 477 U.S. at 533; *Giarratano*, 109 S.Ct. at 2779 nn.14-15 (Stevens, J., dissenting). The default which Virginia's highest court has enforced in this case is exactly the same type of default that this Court and all federal appellate courts consistently enforce. *See, e.g., Thomas*, 474 U.S. at 155 (federal habeas appeal waived by failure to file objections); *Mann v. Lynaugh*, 840 F.2d 1194 (5th Cir. 1988) (federal capital habeas appeal dismissed where notice of appeal one day late). *See also Irwin v. Veterans Administration*, 59 U.S.L.W. 4021 (1990) (civil case properly dismissed where 30-day filing deadline violated). There is, therefore, no doubt that the default enforced in this case is "adequate" to bar federal review. *See Dugger v. Adams*, 489 U.S. 401, 410-412 n.6 (1989) (state ground "adequate" even where prisoner showed a "few cases" where state court had ignored default).

(Continued from previous page)

S.E.2d 278, *cert. denied*, 389 U.S. 825 (1967), are both cases where the Virginia Supreme Court *enforced* its mandatory and jurisdictional rules. Of course, where a habeas petitioner can later show that he was denied his *constitutional* right to the effective assistance of counsel on direct appeal, he can obtain a delayed appeal. *See, e.g., Cabiniss v. Cunningham*, 206 Va. 330, 143 S.E.2d 911 (1965); *Thacker v. Peyton*, 206 Va. 771, 146 S.E.2d 176 (1966); and *Stokes v. Peyton*, 207 Va. 1, 147 S.E.2d 773 (1966). Indeed, in *O'Brien*, the Virginia Supreme Court expressly cited *Cabiniss*, *Thacker* and *Stokes* as examples where relief ultimately can be afforded despite a violation of a mandatory rule of appellate procedure. *See O'Brien*, 207 Va. at 714-715, 152 S.E.2d at 284. These cases, however, have no bearing on Coleman's case because his default occurred on collateral review, where he had no constitutional right to counsel.

b. Coleman's default is unrelated to the fact that his ineffective counsel claims were being litigated on collateral review.

The reason for petitioner's default is plain and simple: the team of attorneys he chose to represent him failed to file a timely notice of appeal as required by unambiguous state law. The default had absolutely nothing to do with the fact that ineffective counsel claims are generally litigated on collateral review.

As this Court has noted, " '[e]ach State's complement of procedural rules . . . *channel[s]*, to the extent possible, *the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.*' " *Carrier*, 477 U.S. at 491, *quoting Reed v. Ross*, 468 U.S. at 10 (emphasis added). Like most states, Virginia recognizes that ineffective counsel claims, which almost invariably deal with evidence not a matter of record at trial, are "most fairly and efficiently" litigated on collateral review where the record can be supplemented with trial counsel's explanation for his or her actions or omissions. *See Walker v. Commonwealth*, 224 Va. 568, 571, 299 S.E.2d 698, 699-700 (1983). *See also Kimmelman*, 477 U.S. at 378 ("an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings").

But the fact that Coleman could not raise his ineffective counsel claims until state habeas proceedings where he had no constitutional right to counsel obviously did nothing to impede his ability to raise such claims. Not only did he raise such claims in his state habeas petition, but the state habeas court afforded him a two-day evidentiary hearing devoted primarily to questioning the effectiveness of his trial attorneys. Coleman was represented throughout those proceedings by a team of attorneys of his own choosing, including members of a prestigious Washington, D.C., law firm, and he was permitted to cross-examine his trial attorneys extensively.

The same attorneys who represented him at the evidentiary hearing also represented Coleman on state habeas appeal. While it is true that counsel failed to file a timely notice of appeal, counsel's error was not, and could not have been, related to the fact that the ineffective counsel claims were being litigated on habeas corpus rather than on direct appeal. And Coleman's suggestion that the Commonwealth somehow "controlled" or "manipulated" his ability to litigate his claims is absurd. (Pet. Br. 38). In order to pursue his claims on habeas appeal, all Coleman and his attorneys had to do was follow Virginia's clear-cut mandatory and jurisdictional rule by filing a timely notice of appeal. The source of their failure to do so was not in any sense "objective" or "external," but was instead wholly subjective and internal. Under these circumstances, Coleman cannot demonstrate "cause" for his default.

C

SOUND REASONS SUPPORT THE CONCLUSION THAT AN ERROR BY HABEAS COUNSEL IS NOT "CAUSE."

1. Accepting Coleman's definition of "cause" would result in a flood of litigation concerning the effectiveness of state habeas counsel.

An already overburdened judicial system certainly does not need a stimulus for additional habeas corpus litigation and evidentiary hearings. Acceptance of petitioner's definition of "cause," however, would supply just such a stimulus.

If the alleged ineffectiveness of state habeas counsel could constitute "cause," then both the state and federal courts undoubtedly would be deluged with habeas petitions asserting that prior state collateral proceedings should be disregarded because of habeas counsel's defective performance. State court petitioners will assert that

procedural bars, such as that embodied in Virginia Code § 8.01-654 B 2,[20] should be ignored because prior habeas counsel was ineffective. Federal petitioners will assert that, even though a claim either was not raised or was abandoned during state habeas proceedings, the default should be excused because of state habeas counsel's ineffectiveness.

It does not require a fertile imagination to foresee the mischief that would be spawned if such a definition of "cause" were adopted. "The result [would be] akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity." *Evitts*, 469 U.S. at 411 (Rehnquist, J., dissenting). The only difference would be that, unlike mirror images which gradually shrink as they approach infinity, the importance of each successive layer of counsel's performance would *never* diminish despite the increasing distance from what should be the focus of attention – the trial and direct appeal. *See Sykes*, 433 U.S. at 90 (state trial is the "main event"); *Prihoda*, 910 F.2d at 1387 (since *Sykes*, "the trial and appeal have become the principal forum for the decision of all constitutional questions").

Resolving such allegations of ineffective habeas counsel often would require an evidentiary hearing, because just as trial and appellate counsel will not ordinarily be deemed "ineffective" without giving them an opportunity to explain their acts or omissions, the same opportunity would have to be afforded to habeas counsel. And, given the Sixth Amendment's clear inapplicability in assessing the performance of habeas counsel, *see Finley*, it is unclear what standard a reviewing court would even apply. Any attempt to identify the types of errors by

---

[20] This statute provides, in pertinent part: "No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."

counsel that would constitute "cause" even though not rising to the level of constitutionally ineffective assistance would revive the confusion about the appropriate standards for judging counsel's performance that this Court's decision in *Strickland v. Washington* eliminated.[21] *See Strickland*, 466 U.S. at 683-684.

Accepting Coleman's definition of "cause" would also raise immediate questions about whether a *pro se* petitioner could similarly establish "cause" by asserting his own "ineffectiveness" or that of a prison "writ writer." *See Prihoda*, 910 F.2d at 1386 (petitioner proffered "the inadequacy of his own assistance" as "cause"). Indeed, if a *pro se* petitioner could not establish "cause" in this manner, states which provide counsel in collateral proceedings as a matter of state law would have every incentive to discontinue that practice: why should a state provide more than the Constitution requires if by doing so it opens itself up to endless litigation? *See Finley*, 481 U.S. at 559 ("Constitution does not put the State to the difficult choice between providing no counsel whatsoever [in collateral proceedings] or following the strict procedural requirements [of the Constitution]").

This Court should not cast the lower courts and the states adrift upon such uncharted waters, for, as demonstrated below, the increased burden for the judicial

---

[21] Coleman's argument that, even though he had no constitutional right to counsel during his state habeas proceedings, he nevertheless is entitled to have habeas counsel's performance assessed for purposes of "cause" under *Strickland's* constitutional standard (Pet. Br. 26-27), is not only contrary to *Finley*, but also demeans the importance of the Sixth Amendment. Indeed, the fallacy of his argument manifests itself in Coleman's "best of both worlds" argument that, while entitled to show "cause" under the *Strickland* standard, *Carrier's* "exhaustion of cause" requirement does not apply to him *because* he had no constitutional right to counsel. (Pet. Br. 27-28 n.20).

system would be accompanied by ever-increasing frustration of the vital interests which *Sykes* and *Carrier* were designed to foster.[22]

2. Establishing habeas attorney error as "cause" would subvert the interests of finality, comity and federalism.

The federal courts' exercise of the writ of habeas corpus to review state court criminal judgments "entails significant costs." *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (footnote omitted). Those costs have been well articulated by the Court. By extending "the ordeal of trial for both society and the accused," collateral review of a criminal conviction "undermines the usual principles of finality of litigation." *Id.* at 127. *See also* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 450-453 (1963). "Liberal allowance of the writ . . . degrades the prominence of the trial itself," and issuance of the writ "frequently cost[s] society the right to punish admitted offenders." *Engle*, 456 U.S. at 127. Finally, because "[f]ederal intrusions into state criminal trials frustrate both the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights," the writ of habeas corpus "imposes special costs on our federal system." *Id.* at 128.

These same costs "are particularly high" when the federal writ is used to review claims that were defaulted in state court. *Id.* at 128. Indeed, such review "intrudes on

---

[22] No doubt because they realized this Court would not knowingly adopt a rule that would create such burdens and difficulties for the judicial system, the inmate-respondents in *Giarratano* disavowed the idea that even a *constitutional* right to counsel during state habeas proceedings could give rise to an assertion of "cause" based upon an alleged ineffective performance by counsel. (See *Giarratano*, No. 88-411, Resp. Br. at 43; copies lodged with this Court).

---

state sovereignty to a degree matched by few exercises of federal judicial authority." *Harris*, 489 U.S. at 282 (Kennedy, J., dissenting).

Sykes and its progeny were designed to minimize these costs and to foster and protect the interests of finality, comity and federalism. If the Court were to accept Coleman's definition of "cause," those interests would be subverted, for the states' interest in enforcing their procedural default rules in collateral proceedings is just as "vital" as their corresponding interest in enforcing such rules at trial and on direct appeal. *See Carrier*, 477 U.S. at 490.

It would be difficult to imagine an outcome that could do more harm to the interests of finality, comity and federalism than a situation where even a full round of state and federal habeas proceedings could no longer be reasonably looked upon as the "end" of a criminal case. If this Court were ever to recognize habeas counsel error as sufficient "cause" to excuse a procedural default, the Court thereby would condemn the judicial system to endless rounds of habeas litigation, each challenging the "effectiveness" of the immediately preceding counsel's performance. The costs to finality and comity – already "particularly high" – could well reach the breaking point.

Rather than subjecting themselves to such never-ending litigation, states could rationally choose to abandon their systems of collateral review. And they would be free to do so because such avenues of relief are not constitutionally required. *See Finley*, 481 U.S. at 557. Indeed, Coleman seems intent upon driving the states in that direction when he asserts that "cause" should be *less* difficult to show when a default occurs on collateral attack because "[b]y providing for collateral review, a state *concedes* that its interest in . . . finality . . . can be outweighed. . . . " (Pet. Br. 30-31 n.25, emphasis added). This Court, however, should refuse to adopt a standard of "cause" which is so open-ended that it ultimately could

result in federal habeas corpus becoming the sole avenue of collateral relief for some, or even all, state prisoners – a result detrimental to the interests of everyone involved. *See Long*, 463 U.S. at 1042 n.8 (emphasizing "vast" role state courts play in adjudicating federal constitutional claims).

IV

THE "NEW RULE" DOCTRINE DICTATES THAT PETITIONER CANNOT OBTAIN FEDERAL HABEAS RELIEF.

Even if this Court were to completely overlook petitioner's clear default during his state habeas corpus proceedings, there is another, equally fundamental reason why he would not be entitled to federal habeas relief: the "new rule" doctrine.

Because this is a federal collateral proceeding, this Court must determine whether Coleman seeks the benefit of a "new rule." This inquiry is mandated because "the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing examination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 110 S.Ct. 2822, 2827 (1990). A federal habeas court, therefore, must "validate reasonable, good-faith interpretations of existing precedents made by state courts." *Saffle v. Parks*, 110 S.Ct. 1257, 1260 (1990).

The "new rule" doctrine is not restricted to cases where a petitioner asks for retroactive application of a case that was decided after his conviction became final. When state courts make "reasonable, good-faith interpretations of existing precedents . . . ," subsequent rulings to the contrary by a federal habeas court are "new" and are thus prohibited. *Butler v. McKellar*, 110 S.Ct. 1212, 1217 (1990), *citing United States v. Leon*, 468 U.S. 897 (1984) ("good faith" exception to exclusionary rule).

Determining whether a state court's rejection of a petitioner's claims was "reasonable" and in "good faith" requires a determination whether constitutional precedent existing at the time the petitioner's conviction became final "compelled" a decision in his favor. *Saffle*, 110 S.Ct. at 1261. Acceptance of a petitioner's claims cannot be considered to have been "compelled," however, if they were "susceptible to debate among reasonable minds." *Butler*, 110 S.Ct. at 1217.

Coleman's conviction and death sentence became final when this Court denied certiorari on March 19, 1984. *Coleman v. Virginia*, 465 U.S. 1109 (1984). None of the claims raised in his federal habeas petition was in any sense "compelled" in 1984, nor are any of his claims "compelled" even today.[23] Conversely, all of his claims were and remain "susceptible to debate" among reasonable jurists. Indeed, the best evidence of this fact is that the state habeas judge, the district court, and to some extent a unanimous panel of the court of appeals, all found that Coleman's claims were meritless. (J.A. 3-19, 39-52, 64-68). *See Butler*, 110 S.Ct. at 1217 ("that the outcome . . . was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges . . . noted previously.").

---

[23] The federal claims which Coleman raised in the Fourth Circuit were as follows: a member of the jury failed to disclose a preconceived opinion of Coleman's guilt; Coleman's trial attorneys rendered ineffective assistance at both stages of trial; the prosecutor failed to disclose exculpatory evidence; the evidence was insufficient to support Coleman's conviction; the jury instructions at the penalty stage were constitutionally inadequate; Virginia's death penalty statute is unconstitutional as applied to Coleman.

Coleman merely disagrees with the good faith legal judgments reached by the state habeas judge and concurred in by the district court. His claims, therefore, are clearly requests for "new rules" and as such are barred from review unless they fall within one of two "narrow" exceptions. *Sawyer*, 110 S.Ct. at 2831. Even a cursory review of his claims demonstrates that neither exception applies. None of his claims would "place an entire category of primary conduct beyond the reach of the criminal law" or "prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense." *Id.* Nor can it be said that acceptance of any of his claims would alter any of the "bedrock" principles which are "absolute prerequisites to fundamental fairness." *Id.* at 2831-2833. Under these circumstances, federal habeas relief cannot be granted on any of petitioner's claims.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

STEPHEN D. ROSENTHAL
Deputy Attorney General

JERRY P. SLONAKER
Senior Assistant Attorney General

*DONALD R. CURRY
Senior Assistant Attorney General

January, 1991

*Counsel of Record